Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TDK CORPORATION,

Petitioner,

v.

WARREN/SHERER REFRIGERATION COMPANY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the First Circuit Court of Appeal for the State of Louisiana

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State may, consistent with due process, exercise personal jurisdiction over a foreign component manufacturer which sold and marketed a component part only in Japan, simply because it was incorporated into a machine made and sold by others in Japan which, following a fortuitous chain of sale and resale among third parties, allegedly caused injury in the State.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TDK Corporation, *Petitioner*

Rule 29.6 Statement

TDK Corporation does not have any non-wholly owned subsidiaries in the United States. TDK does not have a parent corporation.

Warren/Sherer Refrigeration Company, *Respondent*
Sanyo Electric Company, Ltd., *Respondent*
Ms. Barbara Vince, *Respondent*
Mr. Donald Harris, *Respondent*
Ms. Sandra Creel Eisler, *Respondent*
Mrs. Camille McNeese, *Respondent*
Mr. Alfred Lambert, *Respondent*
Ms. Myrtis Statham, *Respondent*
Ms. Donna Warner, *Respondent*
Mrs. Luther Martin, *Respondent*
Ms. Barbara May, *Respondent*
Ms. Carolyn Magee, *Respondent*
Ms. Alene Smith, *Respondent*
Ms. Nora Byrd, *Respondent*
Mr. Charles Ray Weary, *Respondent*
Ms. Irene Carroll, *Respondent*
Mr. M. J. Weary, *Respondent*
Mr. Michael Talmadge Walker, *Respondent*
Ms. Julia McGowan, *Respondent*
Ms. Evelyn Higgins, *Respondent*
Ms. Rebecca Phillips, *Respondent*
Mr. Herbert Toney, *Respondent*
Ms. Julie Richardson, *Respondent*
Ms. June Gatlin, *Respondent*
Mr. Robert Ladner, *Respondent*

Ms. Melissa Seal, *Respondent*
Mrs. Waver James, *Respondent*
Mrs. Mary Jenkins, *Respondent*
Mr. Robert Jenkins, *Respondent*
Mr. Sidney Gayle Bickham, *Respondent*
Ms. Gladys Neil Fields, *Respondent*

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PETITION FOR WRIT OF CERTIORARI

TDK Corporation respectfully petitions for a writ of certiorari to review the judgment of the First Circuit Court of Appeal, State of Louisiana in this case.

OPINIONS BELOW

The opinion of the First Circuit Court of Appeal, State of Louisiana (App., *infra*, 1a-4a) is unreported. The opinion of the 22nd Judicial District Court for the Parish of Washington, State of Louisiana (App., *infra*, 8a-14a) is unreported. The order of the Louisiana Supreme Court denying discretionary review (App., *infra*, 5a) is also unreported.

JURISDICTION

The First Circuit Court of Appeal, State of Louisiana entered its judgment on December 29, 1997 (App., *infra*, 1a-4a). The 22nd Judicial District Court for the Parish

of Washington, State of Louisiana entered its judgment on May 14, 1997 (App., *infra*, 6a-7a) and its Reasons for Judgment on May 14, 1997 (App., *infra*, 8a-14a). The Louisiana Supreme Court entered a judgment denying discretionary review by order dated March 20, 1998 (App., *infra*, 5a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

In addition, La. Rev. Stat. Ann. § 13.3201 provides, in relevant part:

> A. A court may exercise personal jurisdiction over a non-resident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the non-resident:
>
> * * *
>
> (8) Manufacturing of a product or component thereof which caused damage or injury in this state, if at the time of placing the product into the stream of commerce, the manufacturer could have foreseen, realized, expected, or anticipated that the product may eventually be found in this state by reason of its nature and the manufacturer's marketing practices.
>
> B. In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a non-resident on any basis consistent with the constitution of this state and of the Constitution of the United States.

STATEMENT

Petitioner TDK Corporation ("TDK") is a Japanese company in the business of manufacturing and selling

electronic products and components primarily for the domestic Japanese market.[1] A group of plaintiffs filed this state court lawsuit in 1990 as a result of an outbreak of Legionnaires' Disease, allegedly caused by a refrigerated produce case in a Winn-Dixie grocery store in Bogalusa, Louisiana in 1989. The plaintiffs sued and later settled with the principal defendants, Winn-Dixie of Louisiana, Inc. (the store), and with the Respondent, Warren/Sherer (the maker and seller of the produce case). Following this settlement, Warren/Sherer brought TDK into this action by filing a third party demand against Petitioner, TDK, for indemnity. TDK's sole connection to Louisiana and to this case is through its alleged manufacture and sale in Japan of a component electrical drive circuit. The drive circuit was thereafter sold three times by Japanese corporations unrelated to TDK and, without TDK's knowledge or control, incorporated into a humidifier. That humidifier was installed by Warren/Sherer in a refrigerated produce case, which was eventually purchased by Winn-Dixie for its Bogalusa grocery store.

Once served, TDK filed an "Exception of Personal Jurisdiction" in the state district court. TDK urged that under this Court's decision in *Asahi Metal Industry Co., Ltd. v. Superior Court,* 480 U.S. 102 (1987): (i) TDK lacked sufficient minimum contacts with the state of Louisiana for the forum to assert personal jurisdiction over it; and (ii) asserting personal jurisdiction over a domestic Japanese corporation such as TDK would be unfair and unreasonable. The district court disagreed and overruled Petitioner's exception. TDK thereafter applied for supervisory writs to the Louisiana First Circuit Court of Appeal, which affirmed the district court. The Louisiana Supreme Court denied discretionary review.

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[1] *See* Fukushima Declaration (App., *infra*, 17a). Petitioner TDK is a legal entity separate and distinct from other affiliated companies that also use "TDK" in their names. *See* Sweeney Declaration (App., *infra*, 15a-16a), admitted into evidence by the trial court without objection.

A. The Decision Below Is a Final Judgment

The judgment of the Louisiana First Circuit Court of Appeal affirming the district court's overruling of TDK's timely objection to personal jurisdiction is a final judgment within the meaning of 28 U.S.C. § 1257(a). In a Louisiana state court, a defendant must raise personal jurisdiction objections pre-trial, and seek any appeal of an adverse ruling, pre-trial.[2] Unlike in federal court, a defendant may not preserve the personal jurisdiction objection for appeal after disposition of the case on the merits. *Compare* 5A Wright & Miller, Federal Practice and Procedure: Civil 2d § 1351 (West 1990). In a Louisiana court a defendant waives the right to litigate personal jurisdiction upon making a general appearance and litigating the merits.

In this matter the issue of personal jurisdiction has been finally disposed of by the state courts, including the trial court, the state court of appeal, and the state supreme court which denied review. TDK's only alternative to requesting a review in this Court is to file its answer and waive its personal jurisdiction objections, or risk a default. This Court has treated similar pre-trial rulings upholding personal jurisdiction as final judgments when a defendant would be presented with such a Hobson's choice. *See Shaffer v. Heitner,* 433 U.S. 186, 195-96 n.12 (1977) (*citing Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469

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[2] There are only two alternatives under Louisiana law if the personal jurisdiction exception is overruled. First, the defendant may seek interlocutory review by taking a "Supervisory Writ" to the state appeals court and then to the Louisiana Supreme Court. Second, the defendant may file his answer and waive any further objections to personal jurisdiction. Because there is no procedural mechanism to preserve personal jurisdiction objections, the subsequent rulings by the appellate courts on the supervisory writ become "law of the case" which forecloses relitigation of the same issue on a subsequent appeal. *Sattar v. Aetna Life Ins. Co.,* 671 So.2d 550 (La. App. 1996), *citing Tolis v. Board of Supervisors of L.S.U.,* 655 So.2d 747 (La. App.), *rev'd on other grounds,* 660 So.2d 1206 (1995).

(1975)); *see also Burnham v. Superior Court*, 495 U.S. 604, 608 (1990) (taking review on pre-trial rejection of personal jurisdiction objection); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (same). For similar reasons, the decision below is also one from the highest state court from which a decision may be had. See 28 U.S.C. § 1257(a); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

B. Proceedings Below

At a hearing in the trial court on the Exception to Personal Jurisdiction, TDK presented uncontradicted evidence establishing the absence of any contacts with Louisiana, apart from the one drive circuit involved in this case. TDK has no offices, property, or agents in the state, nor does it advertise, do business or solicit business in the state. The evidence showed that the presence of Petitioner's drive circuit in a Louisiana grocery store was fortuitous, and not the product of any purposeful activity on TDK's part or through a predictable chain of distribution. The uncontradicted evidence also showed that TDK was unaware that after five sales among third parties, including installation of its component into another product (a humidifier), which was itself incorporated into still another product (a refrigerated display case), its drive circuit would land in a rural Louisiana Parish.[3]

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[3] During the period 1986-88 TDK sold approximately 1,000 drive circuits per month to a non-exclusive distributor in Japan, Shinko Shoji Co., Ltd. Shinko sold some of the drive circuits to UCAN, Inc., another Japanese corporation. Neither Shinko nor UCAN are owned by or affiliated with TDK. At the time Shinko purchased drive circuits TDK did not know how Shinko or UCAN intended to use the drive circuits or what markets they intended to serve. Since the filing of this lawsuit TDK has learned that UCAN incorporated the drive circuit into completed humidifiers or misting machines. UCAN apparently sold humidifiers to Yamasho Kogyo Co., Ltd., also a Japanese corporation, which sold and exported them to L. W. Beal & Co. in Maine. Beal sold the humidifier to Warren/Sherer and Warren/Sherer incorporated it into a refrigerated produce case. Winn-Dixie of Louisiana, Inc. purchased the produce case from

Nevertheless, the trial court, affirmed by the state court of appeal, upheld the exercise of personal jurisdiction and found minimum contacts. The court of appeal found minimum contacts to exist simply because the drive circuit produced by TDK "may be put to many uses; thus TDK should have foreseen that some of its products would eventually end up in the United States, including Louisiana." (App., *infra*, 3a.) On March 20, 1998, the Louisiana Supreme Court denied discretionary review (4-3), without opinion.

REASONS FOR GRANTING THE PETITION

Both state and federal courts have been "badly divided" in light of the uncertainty generated by the splintered decision of this Court on the question of minimum contacts in *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987).[4] G. Born, International Civil Litigation in United States Courts, p. 139 (3d ed. 1996). At all levels of state and federal courts, conflicting decisions continue to proliferate after *Asahi*. For this reason, and because those who engage in international trade are entitled to know the ground rules, the need for guidance from this Court is acute. This case provides the Court with the opportunity to resolve the confusion generated in the lower courts on an issue that crosses jurisdictional lines. This case also provides the opportunity for this

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Warren/Sherer and installed it in the Winn-Dixie grocery store in Bogalusa, Louisiana. *See* Fukushima Declaration, which was admitted into evidence by the trial court without objection. (App., *infra*, 18a-19a). *See also* Exhibit Chart, which was admitted into evidence by the trial court without objection. (App., *infra*, 21a). Warren/Sherer did not offer affidavits or other countervailing evidence of its own.

[4] The *Asahi* decision produced three opinions, none of which commanded a majority on the question of minimum contacts. Justice O'Connor wrote for four Justices; Justice Brennan for four; and Justice Stevens's opinion was joined by two Justices who had also joined Justice Brennan's opinion.

Court to revisit and resolve the question of what standards to apply in minimum contacts analysis in cases involving foreign corporations, particularly foreign component-part manufacturers in product liability litigation—the issue that was effectively left unresolved in *Asahi*.

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEALS.

A state court may only assert personal jurisdiction over a defendant if the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The analysis of the court below, which concluded that Petitioner should have foreseen that one of its products might reach Louisiana simply because its product could be put to a number of uses, employs a very loose "stream of commerce" approach to minimum contacts that many courts have rejected in the wake of *Asahi*. The split among the lower courts reflects the split among the opinions in *Asahi* on the question of minimum contacts. *See Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 n.1 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995) (noting post-*Asahi* split in federal appellate courts).

In contrast to the decision below, some lower courts tend to follow Justice O'Connor's plurality opinion for four Justices in *Asahi*, which looked for "additional conduct" on the part of a product manufacturer, above and beyond the placement of a product into the stream of commerce. *Asahi*, 480 U.S. at 112. Such conduct might include "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state."

Id. Absent such proof that a defendant purposefully availed itself of the protection of the forum, minimum contacts will not be satisfied in these courts.

For example, in *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671 (1st Cir. 1992), the First Circuit concluded in a products liability action that there was no personal jurisdiction over a foreign manufacturer when there was no evidence that it intended to serve the forum's market through an intervening purchaser or otherwise. *See also id.* at 683 (endorsing Justice O'Connor's *Asahi* plurality); *Falkirk Min. Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 374-75 (8th Cir. 1990) (relying on *Asahi* plurality). Some state courts have adopted a similar approach. *See, e.g., CMMC v. Salinas*, 929 S.W.2d 435 (Tex. 1996) (suggesting state supreme court's precedents indicate court "would follow Justice O'Connor's formulation of the stream-of-commerce rule in Texas"); *Uberti v. Leonardo*, 892 P.2d 1354, 1359 (Ariz. 1992), *cert. denied*, 516 U.S. 906 (1995) (expressly employing the "more retrictive" *Asahi* approach). Here, no evidence of such "additional conduct" beyond placing the drive circuit into the stream of commerce was brought forward, however, or relied on by the court below. In fact, the uncontradicted evidence was that no such affirmative marketing efforts were ever undertaken. The decision below therefore conflicts with the reasoning and result of decisions that require such additional conduct as a prerequisite to finding minimum contacts.

Other courts have taken a different view, but a view that is also in conflict with the decision below. These courts tend to stitch together the opinion of Justice Brennan in *Asahi*, who also wrote for four Justices on the minimum contacts question, with the opinion of Justice Stevens. Justice Brennan's opinion disagreed with the plurality's interpretation of the stream-of-commerce theory. Justice Brennan found that if there is a "regular and anticipated flow of products from the manufacturer to distribution to retail sale, all that is required is that the

defendant be aware that the final product is being marketed in the forum state and no additional conduct on the defendant's part need be shown to establish minimum contacts." *Asahi,* 480 U.S. at 117. While Justice Stevens did not join either of the other two *Asahi* opinions on the minimum contacts question, his opinion found that purposeful availment "requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components." *Id.* at 122.

An illustration of this stitching together of opinions is *Barone v. Rich Bros. Interstate Display Fireworks,* 25 F.3d 610 (8th Cir.), *cert. denied,* 513 U.S. 948 (1994). There, the Eighth Circuit stated "should one engage in vote counting, which we are loathe to do, it appears that five justices agreed that continuous placement of a significant number of products into the stream of commerce with knowledge that the product would be distributed into the forum state represents sufficient minimum contacts to satisfy due process." *Barone,* 25 F.3d at 614-15. *See also Ex parte Pope Chevrolet, Inc.,* 555 So.2d 109, 112 (Ala. 1989) (making similar calculation); *cf. Dehmlow v. Austin Fireworks,* 963 F.2d 941, 945 (7th Cir. 1992) (deciding case under "more permissive stream-of-commerce theory" in *Asahi*). Nevertheless, the decision below conflicts even with this less restrictive approach. There was absolutely no evidence or finding that TDK had knowledge that its drive circuit would be marketed in the United States or Louisiana. Indeed, prior to this suit, TDK had no knowledge that its drive circuit had landed in Louisiana. Moreover, TDK did not utilize a distribution network, such as that in *Barone*, from which it might be concluded that TDK could reasonably expect to be sued in Louisiana.

The best that can be said of the decision below is that, as some other courts have done, it ignored all of the minimum contacts opinions in *Asahi* simply because there was no majority for any one opinion. In *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.,* 9 F.3d 415, 419-20

(5th Cir. 1993), the Fifth Circuit did just that, purporting to rely on this Court's (and its own) pre-*Asahi* authority regarding stream-of-commerce analysis, initially set forth in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).[5] Some state courts have taken a similar view and have purported to apply an expansive, pre-*Asahi* stream-of-commerce approach. *See, e.g., Grange Ins. Ass'n v. State*, 757 P.2d 933, 938 (Wash. 1988), *cert. denied*, 490 U.S. 1004 (1989) (opting for broad stream-of-commerce test, expressly uninfluenced by *Asahi*); *Stanek v. A.P.I., Inc.*, 474 N.W.2d 829, 833 (Minn. App. 1991), *cert. denied*, 503 U.S. 977 (1992) (same).

In holding that TDK is subject to personal jurisdiction in Louisiana, the court below took an expansionist approach to minimum contacts which conflicts with more limited interpretations that have been given to this Court's opinions in *Asahi*—a conflict that arises in substantial part from this Court's fractured minimum-contacts analysis in that case. *See Lister v. Marangoni Meccanica S.P.A.*, 728 F. Supp. 1524, 1527 (D. Utah) (lamenting the "quandary" in which lower courts have been left following *Asahi*); *Wiles v. Morita Iron Works Co., Ltd.*, 530 N.E.2d 1382, 1389 (Ill. 1988) (noting confusion generated by the "extremely balkanized opinion" in *Asahi*).

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[5] In *Ruston*, the Fifth Circuit upheld personal jurisdiction over a defendant component part manufacturer after its product was incorporated by another company, even though there was no direct sales relationship between the defendant and the plaintiff. *Asahi* notwithstanding, the court stated that "mere foreseeability or awareness" *is* a "constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce." *Ruston*, 9 F.3d at 419. Nevertheless, in *Ruston* the defendant had actual knowledge that its products were being shipped to the forum. TDK did not know its drive circuit had been incorporated into a humidifier or that it was being exported to the United States or that it was later sold to Respondent Warren/Sherer. *Compare Wiles v. Morita Iron Works Co., Ltd.*, 530 N.E.2d 1382, 1389 (Ill. 1988) (reading Justice Brennan's opinion in *Asahi* to require "at a minimum" such actual knowledge).

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *ASAHI METAL INDUSTRY CO., LTD. v. SUPERIOR COURT.*

In upholding the exercise of specific jurisdiction in this case, the appellate court relied on the trial court's "finding" that TDK should have foreseen that some of its component products would eventually end up in the United States, including Louisiana. There is no evidence to support this finding. It is undisputed that TDK sold the drive circuit in question to Shinko, another Japanese corporation (see footnote 3 above). TDK's awareness of the disposition of its drive circuit ends there. Only after this lawsuit was filed did TDK learn that Shinko sold the drive circuit to yet another Japanese corporation, UCAN, which incorporated the drive circuit into a humidifier. UCAN sold the humidifier to another Japanese corporation, Yamasho, which sold and exported it to Beal, a Maine corporation. Beal subsequently sold the humidifier to Respondent Warren/Sherer, a Georgia corporation, which installed it into a refrigerated produce case. Warren/Sherer sold the produce case to Winn-Dixie for use in its Bogalusa grocery store. Thus, the court below effectively held that TDK was subject to jurisdiction in Louisiana simply because TDK placed the drive circuit into the "stream of commerce" in Japan.

Absent general jurisdiction, however, personal jurisdiction over TDK is proper only if TDK's contacts with Louisiana relating to the Bogalusa incident constitute "minimum contacts" that result from purposeful activity directed toward Louisiana, and if the exercise of jurisdiction over TDK comports with traditional notions of fair play and substantial justice. The court below did not properly apply either part of this Court's two-pronged analysis. Instead, it employed a much more expansive view of the stream-of-commerce doctrine. The only evidence in the record involved the unrebutted affidavits submitted by TDK and from which the appellate court concluded that

if the product has multiple uses,[6] TDK must have reasonably anticipated the arrival of some of its products in Louisiana. The appellate court's analysis and its conclusion go well beyond any of this Court's opinions in *Asahi.*

A. Minimum Contacts Were Lacking.

In *World-Wide Volkswagen* this Court noted that

> if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the [defendants] to serve, directly or indirectly, the market for its product . . . it is not unreasonable to subject it to suit . . . . The forum State does not exceed its power under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

World-Wide Volkswagen, 444 U.S. at 297-98. The court below erred insofar as the evidence shows that it was solely the unilateral actions of third parties that caused the drive circuit to land in Louisiana. There was no action whatsoever on the part of TDK that was "purposefully directed toward the forum state." *Asahi,* 480 U.S. at 112. The fact that these drive circuits might have "many uses" simply does not equate to an effort by TDK to serve the Louisiana market.

As Justice O'Connor stated in her plurality opinion in *Asahi,* "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state. *Id.* As noted above, a plurality of the Court suggested a number of examples of additional conduct which would satisfy the requirement that a defendant have a "substantial connec-

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[6] This finding is contrary to the undisputed Fukushima Declaration, which is in evidence and unrebutted. It clearly states that TDK's drive circuits serve a variety of uses *in connection with humidifiers and misting machines.* (App., *infra,* 18a).

tion" with the forum by indicating an intent or purpose to serve the market in the forum State. *Id.* But nothing in any of those examples even remotely pertains to whether the product in question has multiple uses as found by the court below. Further, the record does not reflect and no evidence was offered that TDK marketed or advertised this or any other product in Louisiana or designed the drive circuit for the Louisiana market or utilized a distribution chain to reach the United States. On the contrary, the uncontroverted evidence indicates only that TDK marketed and sold its drive circuit domestically in Japan. *Compare, e.g., Vermeulen v. Renault, U.S.A., Inc.*, 965 F.2d 1014, 1026 (11th Cir. 1992) (foreign defendant created and controlled the distribution network that brought its products into the United States and Georgia).

Even under Justice Brennan's arguably broader stream-of-commerce theory, the Louisiana appellate court misapplied the test. There is no showing of a "regular and anticipated flow of products from the manufacturer to distribution to retail sale" or that the defendant economically benefits from the sale of the final product in the forum state. Under this alternate approach, TDK's total lack of involvement—whether direct or indirect—in the fate of this one drive circuit in Louisiana precludes TDK from being haled into court in Louisiana. TDK did not benefit economically except from the sale of the drive circuit in Japan to another domestic Japanese corporation. There is no evidence that TDK was actually aware or should have reasonably been aware that the drive circuit it sold domestically in Japan would, by the fortuitous acts of third parties, come to be incorporated in a device that would find its way into Louisiana. Finally, the lower courts did not make any finding concerning the number of drive circuit units marketed in Japan or eventually exported by others. The lower court's minimum contacts analysis therefore contradicts this Court's opinions in

Asahi, as well as the minimum contacts analyses of many state and federal courts.

B. The Exercise of Jurisdiction Would Be Unreasonable.

In addition, the lower court misapplied the "fairness" portion of the due process analysis. On this point, in contrast to their minimum contacts analyses, the Justices in *Asahi* were in substantial agreement. The Court has considered a number of factors to be relevant in determining whether the exercise of personal jurisdiction over a defendant is fair and reasonable. These factors include the burden on the defendant, the forum state's interest in the dispute, the plaintiff's interest in obtaining convenient and effective relief, the judicial system's interest in obtaining an efficient resolution on the controversies, and the state's shared interest in fostering fundamental social policies. *Asahi*, 480 U.S. at 114 (*citing World-Wide Volkswagen*, 444 U.S. at 292); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

In its opinion, the court below limited its analysis of the fairness factors, choosing only to adopt the trial court's finding that "the court observed that it possessed a 'strong interest in providing citizens of its state with a forum in which to litigate their claims . . . and that judicial economy would be better served by resolving the remaining disputes in this Court where the matter has been ongoing for some time.'" (App., *infra*, 3a). This simply misapplies *Asahi*. In declining to exercise jurisdiction, the *Asahi* Court considered all of the factors, but gave particular emphasis to the "unique burdens" on the foreign defendant "who must defend [it]self in a foreign legal system" and the judicial system's interest in resolving disputes in light of its international setting. On both counts, this Court held that to exercise personal jurisdiction over the foreign component manufacturer would be unreasonable. *Asahi*, 480 U.S. at 114-16.

The analysis and the conclusion are no different here. First, like the Japanese defendant in *Asahi*, the burden on TDK in traversing the distance between its headquarters in Japan and Louisiana would be substantial. Second, the interest of Warren/Sherer, a Georgia corporation, in obtaining convenient relief is questionable due to its delay in adding TDK to this action. Third, the Louisiana plaintiffs only added a claim against TDK after TDK was brought in as a third party defendant, and well after the first hearing on TDK's jurisdictional exception.[7] Therefore, as in *Asahi*, the exercise of personal jurisdiction over TDK would be unfair and unreasonable.

III. THIS CASE PRESENTS AN IMPORTANT AND UNSETTLED QUESTION THAT THIS COURT SHOULD RESOLVE.

This is not just a case of how wrong the lower court was in deciding the personal jurisdiction issue against TDK. Rather, this case is an example of the confusion

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[7] Both this case and *Asahi* involve a third party indemnity claim between two nonresident corporations where the interests of the original plaintiffs had been resolved through settlement. Almost a year and a half after their settlement and well *after* the first hearing on TDK's jurisdictional exception, the plaintiffs amended their petition to attempt to add TDK as a direct defendant. However, the plaintiffs did not file briefs on the issue at the second hearing in the district court, in the court of appeal or in the Louisiana Supreme Court. As in *Asahi*, the main event in this case is the third party indemnity claim by Warren/Sherer against TDK. Warren/Sherer has made all the arguments in favor of personal jurisdiction. The plaintiffs are merely trying to "piggy back" along after their settlement with Warren/Sherer and the other original defendant. Such piggy-backing should have minimal impact, if any, on the "fairness" analysis. Otherwise, plaintiffs who do not name a particular party as an original defendant certainly could be expected to add a claim against that party after it is brought in as a third-party defendant and get a "free ride" on the personal jurisdiction ruling. Indeed, original defendants might encourage them to do so if a claim by the plaintiff would buttress their own personal jurisdiction argument.

that cuts across the spectrum of state and federal court decisions that have come after this Court's decision in *Asahi*, particularly with respect to minimum contacts analysis in cases involving foreign component part manufacturers in product liability litigation. Because of the lack of a majority opinion on this issue, this important question remains effectively unresolved.

As indicated above, state and federal courts have differed greatly since *World-Wide Volkswagen* in their interpretations of the stream-of-commerce theory. Some courts have held that little more than foreseeability or awareness is constitutionally sufficient if the defendant's product landed in the forum State while still in the stream of commerce. *See, e.g., Dehmlow v. Austin Fireworks*, 963 F.2d 941 (7th Cir. 1992); *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir. 1984); *Grange Ins. Ass'n v. State*, 757 P.2d 933, 938 (Wash. 1992). Other courts have understood due process to require something more. *See, e.g., Anderson v. Metropolitan Life Ins. Co.*, 694 A.2d 701 (R.I. 1997); *Falkirk Min. Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939 (4th Cir. 1994); *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671 (1st Cir. 1992). Still other courts are unsure what analysis to employ. Some state categorically that they do not want to get involved with an "unsettled" area of jurisprudence. Some of those courts attempt analytically to return to the "basics" of *World-Wide Volkswagen*. *See Lebel v. Everglades Marina, Inc.*, 558 A.2d 1252 (N.J. 1989); *Ham v. La Cienega Music Co.*, 4 F.3d 413 (5th Cir. 1993). Other courts have refused to adopt any test and, instead, distinguish cases on the facts presented, or say that the minimum contacts issue should be avoided where possible when a decision can be grounded upon "reasonableness." *See, e.g., Lister*, 728 F.Supp. at 1527. Other courts have decided minimum contacts cases finding that the facts satisfy either the test

set forth in *World-Wide Volkswagen* or any of the approaches set forth in *Asahi*. *Renner v. Lanard Toys Ltd.*, 33 F.3d 277 (3d Cir. 1994); *Heins v. Wilhelm Loh Wetzlar Optical Machinery GmbH & Co. KG.*, 522 N.E.2d 989 (Mass. App. 1988); *W.R. Grace & Co. v. CSR Limited*, 666 N.E.2d 8 (Ill. App. 3d Dist. 1996). This Court needs to provide guidance to lower state and federal courts to resolve this confusion.

There is not only a need to provide guidance to lower courts. Product manufacturers need a predictable method by which they can anticipate the jurisdictional effects of producing and marketing their products. *Cf. Shaffer v. Heitner*, 433 U.S. 186, 217-19 (1977) (Stevens, J., concurring in judgment) (due process requires "fair warning" that particular activity may subject defendant to suit in forum). This Court should provide that guidance and set forth a clear standard by which manufacturers can "reasonably anticipate" being haled into court in a particular forum. If guidance is not provided by this Court the continued proliferation of conflicting decisions could have a negative impact on interstate and international commerce. *See* Zekoll, *The Role and Status of American Law in the Hague Judgments Conventions Project*, 61 Alb. L. Rev. 1238, 1298 (1998) (giving voice to the frustrations of the international community). Moreover, if this Court does not address the issue and lower courts, such as the court below, continue to digress into an even broader stream-of-commerce analysis, the result could be a type of "per se" personal jurisdiction in which a manufacturer, foreign or domestic, becomes subject to personal jurisdiction once its product leaves the factory doors. At least one lower court has recognized this problem:

> To permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent

> in our system of federalism. Such a rule would subject defendants to judgment in locations based on the activity of third persons and not the deliberate conduct of the defendant, making it impossible for defendants to plan and structure their business contacts and risks.

Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 945 (4th Cir. 1994).

These issues are particularly acute in light of international comity concerns, and the fact that it is unclear how such issues "count" in the minimum contacts or fairness analysis. This confusion has undoubtedly resulted from the statement in *Asahi* that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115-16 (*quoting United States v. First National City Bank*, 379 U.S. 378 (1965) (Harlan J., dissenting)). Lower courts have wrestled with this language in an effort to address the problems inherent in subjecting a foreign national to jurisdiction in a place where it may or may not understand the ramifications of its selling and marketing practices. *See, e.g., Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1569 (Fed. Cir. 1994); *Omeluk v. Langsten Slip & Batbyggeri* A/S, 52 F.3d 267, 271 (9th Cir. 1995); *Falkirk Min. Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375-76 (8th Cir. 1990); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 945 (7th Cir. 1992); *Lesnick*, 35 F.3d at 945. In addition to setting standards so that companies may structure their business risks with predictability, this Court also needs to resolve the confusion involved with weighing fairness against minimum contacts. Otherwise, in future cases the purported interests of the forum state may end up trumping minimum contacts, giving rise to a "presumption" of personal jurisdiction, even in the weakest of showings on minimum contacts, as the court below seems to have implicitly concluded. *Cf. Nowak v. Tak How Investments,*

Ltd., 94 F.3d 708, 717 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1333 (1997) (suggesting a "sliding scale" in which fairness issues may "fortify" a marginal showing of minimum contacts).

In summary, the lower courts continue to be in a quandary concerning the application of both minimum contacts and fairness—a matter of extreme importance to the Court, to component part manufacturers, and other business entities whose business dealings may touch upon forums other than their own. This case presents an opportunity for this Court to address these conflicting jurisdictional standards and to bring clarity and predictability to this area. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATE OF LOUISIANA
COURT OF APPEAL

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97 CW 1964

DORMAN O. CROWE, *et al.*

versus

WINN-DIXIE OF LOUISIANA, INC., *et al.*

Dec. 29, 1997

On Supervisory Writ of Certiorari From the
Twenty-Second Judicial District Court
Parish of Washington, Louisiana
Trial Court Nos. 64,215 c/w 64,314

Honorable Patricia T. Hedges, Judge

BEFORE: FOIL, WHIPPLE AND KUHN, JJ.

Per Curiam.

This civil writ application challenges the denial of relator TDK Corporations's declinatory exception of lack of personal jurisdiction. For the reasons expressed, the application is denied.

This litigation arises out of the outbreak of Legionnaire's Disease in Bogalusa in 1989. The Center for

Disease Control concluded that the bacteria causing the outbreak developed in one or more ultrasonic humidifiers located in a produce display case at a Winn Dixie. Plaintiffs, in consolidated suits, sued Winn Dixie, Warren/Sherer (which purchased and installed the display case in which the humidifiers were located), Yukuan Kabushiki Kaisha Co., Ltd. (Ucan) (which manufactured the humidifiers), and L.W. Beal, Inc. (which distributed and sold the Japanese humidifier in the United States.) Winn Dixie and Warren/Sherer filed third party demands against TDK Corporation and Sanyo Electric Company. Plaintiffs then amended their petition to name TDK as a defendant.

TDK, a Japanese corporation with its principal place of business in Tokyo, is the manufacturer of an electrical drive circuit which may have been incorporated into the humidifiers installed by Warren/Sherer in the produce case eventually purchased by Winn Dixie. TDK filed its first declinatory exception of lack of personal jurisdiction in August, 1994 in response to Warren/Sherer's third party demand; TDK's second such exception was filed in February, 1997 in response to plaintiffs' amended petition. The exceptions were heard on May 2, 1997 and denied on May 14, 1997. An earlier application was not considered due to rule violations. 97 CW 1560 (8/21/97). This application ensued.

Due Process requires that in order to subject a nonresident defendant to a personal judgment, the defendant must have sufficient minimum contracts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Minimum contacts must arise from actions by which the nonresident defendant purposefully avails itself of the privilege of conducting business activities within the forum state, thus invoking the benefits and protections of its laws. This purposeful availment requirement ensures that a defendant will not be

haled into a jurisdiction solely as a result of random, fortuitous or attenuated contacts. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985).

The initial burden of proof is on the plaintiff to show that minimum contacts exist. *de Reyes v. Marine Management & Consulting Ltd.,* 586 So.2d 103, 107 (La. 1991). The trial court in the instant case observed that the drive circuit produced by TDK "may be put to many uses; thus TDK should have foreseen that some of its products would eventually end up in the United States, including Louisiana." The court found that Warren/Sherer had met its burden of proving minimum contacts, relying in part upon *American Valve Mfg. Co. v. Valvo Industria Ing Rizzio,* 28,942 (La. App. 2d Cir. 12/11/96); 685 So.2d 1156, *writ denied,* 97-0120 (La. 3/7/97); 689 So.2d 1378. We find no error in the court's conclusion in this regard.

Once the court finds minimum contacts, a presumption arises that jurisdiction is reasonable. The burden of proof shifts to the defendant to prove that the assertion of jurisdiction would be so unreasonable in light of traditional notions of fair play and substantial justice as to overcome the presumption of reasonableness created by the defendant's minimum contacts with the forum. *de Reyes* at 107. Where, as here, the juirsdictional issue is submitted on documentary evidence, the burden on the non-moving party is relatively slight and all reasonable inferences from the record are to be drawn in favor of the non-moving party, i.e., in favor of finding jurisdiction. *de Reyes* at 109.

Here, the court observed that it possessed a "strong interest in providing citizens of its state with a forum in which to litigate their claims . . . and that judicial economy would be better served by resolving the remaining disputes in this Court where the matter has been ongoing for some time." We are unpersuaded that the assertion of

jurisdiction in this case would be unreasonable in light of traditional notions of fair play and substantial justice.

As we find no error in the trial court's denial of relator's exception, the application is denied.

WRIT DENIED.

Foil J. dissents and would grant the application.

APPENDIX B

THE SUPREME COURT OF THE STATE OF LOUISIANA

No. 98-CC-0267

DORMAN O. CROWE, *et al.*

vs.

WINN-DIXIE OF LOUISIANA, INC., *et al.*

IN RE: TDK Corporation; —Defendant(s); Applying for Supervisory and/or Remedial Writ; Parish of Washington 22nd Judicial District Court Div. "C" Number 64, 215, 64,314; to the Court of Appeal, First Circuit, Number CW97 1964

March 20, 1998

Denied.

HTL

PFC

CDK

JTK

MARCUS, J. would grant the writ.

JOHNSON, J. not on panel.

VICTORY, J. would grant the writ.

TRAYLER, J. would grant the writ.

Supreme Court of Louisiana

APPENDIX C

22ND JUDICIAL DISTRICT COURT
PARISH OF WASHINGTON
STATE OF LOUISIANA

No. 64-215

MILDRED JONES

versus

WINN-DIXIE OF LOUISIANA, INC., *et al.*

- consolidated with -

22ND JUDICIAL DISTRICT COURT
PARISH OF WASHINGTON
STATE OF LOUISIANA

No. 64, 314

DORMAN O. CROWE, *et al.*

versus

WINN-DIXIE OF LOUISIANA, INC., *et al.*

JUDGMENT

Currently before the Court are TDK's exceptions of lack of personal jurisdiction which came on for hearing on May 2, 1997, and were taken under advisement.

After considering the evidence and the law, and for the reasons assigned this date,

IT IS ORDERED, ADJUDGED AND DECREED that TDK's exceptions of lack of personal jurisdiction be and hereby are OVERRULED.

Covington, Louisiana, this 14th day of May, 1997.

/s/ Patricia T. Hedges
JUDGE PATRICIA T. HEDGES
22nd Judicial District
Division "C"

[Filed 5-23, 1997]

APPENDIX D

22ND JUDICIAL DISTRICT COURT
PARISH OF WASHINGTON
STATE OF LOUISIANA

No. 64-215

MILDRED JONES

versus

WINN-DIXIE OF LOUISIANA, INC., *et al.*

- consolidated with -

22ND JUDICIAL DISTRICT COURT
PARISH OF WASHINGTON
STATE OF LOUISIANA

No. 64, 314

DORMAN O. CROWE, *et al.*

versus

WINN-DIXIE OF LOUISIANA, INC., *et al.*

REASONS FOR JUDGMENT

Currently before the Court are TDK's declinatory exceptions urging lack of personal jurisdiction which came on for hearing on May 2, 1997, and which this Court took under advisement. In August 1994, in response to a

third party petition of Warren/Sherer (A Division of Kysor Industrial Corporation), TDK filed the first of these two declinatory exceptions. In February 1997, TDK filed the second such exception, this time as to the consolidated plaintiffs' second amended and supplemental superseding petition in the above-captioned matter.

This suit arises out of a 1989 outbreak of legionnaire's disease in Bogalusa, Louisiana. The source of the outbreak allegedly was a humidifier or misting machine installed in a refrigerated produce show case in a Winn-Dixie supermarket in Bogalusa. The principal defendant, Winn-Dixie of Louisiana, Inc., ("Winn Dixie"), setttled with the plaintiffs. Defendant Warren-Sherer also settled with the plaintiffs and then sought indemnification from TDK, a Japanese corporation with its principal place of business in Tokyo, Japan. At all relevant times, TDK had no physical presence in Louisiana. However, TDK manufactured a component, an ultrasonic transducer and drive circuit ("drive circuit"), which allegedly was incorporated into the subject humidifier.

The drive circuit wended its way to Bogalusa through the stream of commerce. TDK sold the drive circuit to another Japanese corporation, Shinko Shoji Co., Ltd, which then sold it to another Japanese corporation, UCAN, Inc. ("UCAN"). UCAN incorporated the drive circuit into a finished humidifier it built and then sold to a fourth Japanese corporation, Yamasho Koygo Co., Ltd. Yamasho sold the humidifier to L. W. Beal & Co., a Maine corporation, which sold the humidifier to Warren/Sherer, a Georgia corporation. Warren/Sherer incorporated the UCAN humidifier into a refrigerated produce case and then sold it to, and installed it for, Winn-Dixie.

The sole issue before the Court today is whether this Court constitutionally can exercise personal jurisdiction over TDK.

TDK contends it does not have the requisite minimum contacts with the forum state to make it subject to suit here, relying on *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 107 S.Ct. 1026 (1987). TDK contends that it would not be fair to require TDK to litigate in Louisiana.

Warren/Sherer's position is that specific jurisdiction exists as to TDK because TDK manufactured a component part which caused harm in this state. In addition, Warren/Sherer argues that it would be fair to require TDK to litigate in this forum.

The burden of proof is initially on the party opposing the exception to prove minimum contacts. *de Reyes v. Marine Management and Consulting, Ltd.*, 586 So.2d 103, 109 (La. 1991). "Once the court finds minimum contacts, a presumption arises that jurisdiction is reasonable and the burden of proof shifts to the defendant to make 'a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" *American Valve Manufacturing Co. v. Valvo Industria Ing Rizzio*, 28,942, 28,943 (La. App. 2nd Cir. 12/11/96); 685 So.2d 1156, 1160.

LAW

The Louisiana long-arm statute provides that "a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States." La. R.S. 13:3201(B).

The test for determining whether there is personal jurisdiction over a defendant is whether the defendant has "certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *de Reyes, supra*, 586 So.2d at 105.

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' " *Burger King Corporation v. Rudzewicz,* 471 U.S. 462, 471, 105 S. Ct. 2174, 2181 (1985), *citing International Shoe v. Washington* 326 U.S. 310, 319, 66 S.Ct. 154, 160 (1945). The *Burger King* Court concluded that " '[t]he forum State does not exceed its powers under the Due Process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State' and those products subsequently injure forum consumers." *Burger King, supra,* 471 U.S. at 473, 105 S.Ct. at 2182 (citations omitted).

TDK relied on *Asahi, supra,* a product liability case which arises out of a motorcycle accident in California. Asahi, a Japanese manufacturer of valves, sold some of its valves to a Taiwanese tire manufacturer, Cheng Shin. Cheng Shin, whose market was international, incorporated the Asahi valves it purchased into some of its tires. California accounted for twenty-percent of Cheng Shin's U.S. sales. Asahi had no other contact with the state of California. The principal parties having settled, the only remaining litigation arising out of the incident was Cheng Shin's demand for indemnity from Asahi.

The *Asahi* Court set forth the law as follows:

> The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant. '[T]he constitutional touchstone' of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposefully established 'minimum contacts' in the forum State." . . . [M]inimum contacts must have a basis in 'some act by which the defendant purpose-

> fully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' . . . "Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that creates a 'substantial connection' with the forum State."

Asahi, supra, 480 U.S. at 108, 107 S. Ct. at 1030 (citations omitted).

Applying a "stream of commerce-plus" test, a plurality of the Court found that Cheng Shin had "not demonstrated any action by Asahi to purposefully avail itself of the California market." *Ashai,* [sic] 107 S.Ct. at 1032. Ultimately, the Court found insufficient contact between the defendant and the forum state to make the exercise of personal jurisdiction consistent with fair play and substantial justice. *Id.* at 1034.

Despite the inability of a majority of the Court to agree on whether the test should be "stream of commerce" or "stream of commerce-plus," the *Asahi* Court was able to reach a decision based on its finding that it would not be fair to compel Asahi to litigate Cheng Shin's indemnity in California. The decision appears to have been strongly influenced by the forum state's lack of a compelling interest in presiding over a dispute between two non-residents.

In the instant case, by contrast, this Court has a strong interest in providing citizens of its state with a forum in which to litigate their claims. In briefs to this Court, TDK concedes that it would probably be amenable to suit in Georgia. There is little additional burden in requiring TDK to defend itself in Louisiana; moreover, judicial economy will be better served by resolving the remaining disputes in this Court where the matter has been ongoing for some time.

Warren[]Sherer relies on *American Valve Manufacturing Co., supra.* In *American Valve,* a welder in Louisiana

was injured when a valve failed, setting off a chain of unfortunate events. The plaintiff sued the owner of the compressor station where the accident occurred, the vendor who sold the valve to the owner, the distributor and AV, which allegedly designed and manufactured the valve. AV third partied Valvo Industria Ing Rizzio ("VIR") the Italian valve manufacturer. Because VIR delivered its products into the stream of commerce with the expectation that they would be purchased by consumers in the forum state, the *American Valve* court found personal jurisdiction existed over VIR. The court noted that "[a] strong showing of fundamental fairness may serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *American Valve, supra,* 685 So.2d at 1160 (citations omitted). The court concluded that there were minimum contacts, considering the volume and duration of VIR sales to AV as well as the versatility of the valves. *Id.* at 1161. Specifically, the *American Valve* court held that "[t]hrough its conduct, VIR should have known that it was benefitting from the Louisiana market and thus should have anticipated that it could be haled into court here." *Id.* (citation omitted).

Similarly, in the instant case, the drive circuit produced by TDK may be put to many uses; thus, TDK should have foreseen that some of its products would eventually end up in the United States, including Louisiana.

In sum, this Court finds that Warren/Sherer carried its burden of proof with regard to TDK's minimum contacts with the forum state. TDK, on the other hand, did not carry its burden of proving that it would be unduly burdensome to litigate in Louisiana in a suit brought by Louisiana plaintiffs regarding an incident which occurred in Louisiana.

Accordingly, TDK,s exceptions of lack of personal jurisdiction will be overruled.

Covington, Louisiana, this 14th day of May, 1997.

/s/ Patricia T. Hedges
JUDGE PATRICIA T. HEDGES
22nd Judicial District
Division "C"

[Filed 5-23, 1997]

APPENDIX E

22ND JUDICIAL DISTRICT COURT
FOR THE PARISH OF WASHINGTON
STATE OF LOUISIANA

No. 64,215
Division "B"

DORMAN O. CROWE, *et al.*

versus

WINN-DIXIE OF LOUISIANA, INC., *et al.*

DECLARATION OF FRANCIS J. SWEENEY, JR.

I, Francis J. Sweeney, Jr., declare:

1. I am the Vice President, General Counsel and Secretary of TDK U.S.A. Corporation ("TUC"). I make this declaration in that capacity and on the basis of my personal knowledge and, if called as a witness, I could and would testify competently as to the truth of the matters stated herein.

2. TUC is a corporation organized and existing under the laws of the State of New York, with its principal offices and place of business in Port Washington, New York. TUC is a wholly-owned subsidiary of TDK Corporation ("TDK") a corporation organized and existing under the laws of the Nation of Japan with its principal place of business in Tokyo, Japan. TUC is a holding company for certain second tier U.S. subsidiaries of TDK.

3. TDK Electronics Corporation ("TEC") is a New York corporation with its principal place of business and

offices in Port Washington, New York. TEC is wholly-owned by TUC and is principally engaged in the business of the production and sale of recording media, including audio and video tapes, floppy disks and optical disks.

4. TUC, TEC and TDK are separate and distinct corporations. TUC ,TEC and TDK are managed by their own boards of directors and officers. TUC, TEC and TDK maintain separate books and accounts and file separate tax returns TUC and TDK each. TUC, TEC and TDK each handle its own day to day business and operational decisions, including those relating to the manangemet of its facilities and finances. Thus, TEC conducts all of its own advertising and sales independent of TUC or TDK.

5. Although TEC products, in the form of audio and video tapes and other recording products, are distributed by independent distributors in Louisiana, TEC is not currently and never has been engaged in the distribution or sale of ultrasonic transducers and drive circuits in Louisiana or elsewhere in the United States.

I declare under penalty of perjury under the laws of the State of Louisiana, that the foregoing is true and correct.

Executed this 7th day of November, 1994 at Port Washington, New York.

/s/ Francis J. Sweeney, Jr.
FRANCIS J. SWEENEY, JR.
Vice President, General Counsel
and Secretary

[Notary Omitted]

APPENDIX F

DECLATION OF TERUO FUKUSHIMA

I, Teruo Fukushima, declare:

1. I am the General Manager of the Legal Affairs Department of TDK Corporation. I make this declaration in that capacity and on the basis of my personal knowledge and, if called as a witness, I could and would testify competently as to the truth of the matters stated herein.

2. TDK Corporation ("TDK") is a corporation organized and existing under the laws of the sovereign nation of Japan. TDK has its headquarters and principal place of business at 13-1 Nihonbashi, 1-chome, Chuo-ku, Tokyo, Japan.

3. TDK is engaged generally in the business of manufacturing a broad variety of electronic products and components. TDK does not, however, conduct any of its business in the State of Louisiana. Nor does TDK have any presence in the State of Louisiana, other than through its representation by Louisiana counsel in connection with this litigation. Thus,

(a) TDK has no employees in the State of Louisiana;

(b) TDK owns no real property or personal property located in the State of Louisiana;

(c) TDK has no agents, whether for service of process or otherwise, or representatives located in the State of Louisiana;

(d) TDK does not own, lease, operate or maintain any office, place of business, facility or other premise in the State of Louisiana;

(e) TDK has neither sold nor shipped goods manufactured by it into the State of Louisiana;

(f) TDK has conducted and conducts no advertising of its products or goods for sale in the State of Louisiana.

(g) TDK has neither filed income tax returns nor paid any taxes in the State of Louisiana;

(h) TDK has neither instituted litigation nor been the subject of litigation in the State of Louisiana, other than this litigation;

(I) neither TDK nor any of its employees, representatives or agents have even attended any trade shows in the State of Louisiana;

(j) TDK is not licensed to do business in the State of Louisiana; and

(k) TDK does not maintain any bank accounts in the State of Louisiana.

4. I have reviewed various court documents filed in connection with this litigation, including documents served upon TDK by third party plaintiff Warren/Sherer, Division of Kysor Industrial Corporation ("Warren Sherer"). On that basis, I understand that this litigation concerns a humidifying or misting machine alleged to have been the cause of an outbreak of Legionnaire's Disease in Bogalusa, Louisiana. TDK does not manufacture or produce completed humidifiers or humidifying or misting machines.

5. TDK does, however, manufacture and produce an electronic component known as an ultrasonic transducer and drive circuit (hereinafter, referred to as a "drive circuit"). TDK's drive circuits are standard off-the-shelf components having a broad variety of applications and uses in connection with humidifiers and misting machines. A photograph of one such drive circuit is attached hereto as Exhibit "A" and incorporated herein by this reference.

6. During the period from 1986 through 1988, TDK sold drive circuits which it manufactured, at the rate of

approximately 1000 drive circiuts a month, to its non-exclusive product distributor in Japan, Shinko Shoji Co., Ltd. ("Shnko"), a Japanese corporation entirely unaffiliated with TDK. TDK has learned that Shinko in turn sold some of the drive circuits Shinko purchased from TDK to UCAN, Inc. ("UCAN"), also a Japanese corporation entirely unaffiliated with TDK. At the time that TDK sold the drive circuits to Shinko from 1986 to 1988, however, TDK had no knowledge or information as to the specific uses Shinko, or Shinko's customer, UCAN, intended for the drive circuits or of the markets in which Shinko or UCAN sold their products.

7. From the court documents I have seen, I am informed and believe that UCAN incorporated TDK drive circuits into completed humidifiers or misting machines manufactured by UCAN. TDK has also since learned that UCAN, in turn, sold humidifiers to Yamasho Kogyo Co., Ltd. ("Yamasho"), also a Japanese corporation. Based upon my review of the court documents, I am further informed and believe that Yamasho sold the UCAN humidifiers to L.W. Beal & Co. ("Beal") in Maine. I am further informed and believe that Beal incorporated a UCAN-manufactured humidifier into a refrigerated produce case which Beal sold to defendant and third party plaintiff herein Warren/Sherer, a Georgia corporation. I am further informed and believe that Warren/Sherer sold the refrigerated produce case in question to Winn-Dixie of Louisiana, Inc. ("Winn-Dixie") which installed it in the Winn-Dixie supermarket located in Bogalusa, Louisiana. TDK, however, has never sold any products, including drive circuits, to UCAN, Yamasho, Beal, Warren/Sherer or Winn-Dixie. Furthermore, other than the sale of standard, off-the-shelf, drive circuits to Shinko, as described above, TDK had no role whatsoever in the design, manufacture or production of any humidifiers sold by UCAN to Beal or any other entities.

8. All TDK employees having any information or knowledge concerning the drive circuits sold by TDK to

Shinko are located in Japan. Similarly, any documents and information with respect to those drive circuits are located in Japan. For these reasons, and because TDK has no presence in the State of Louisiana, the defense of this litigation in Louisiana would be extremely burdensome and inconvenient to TDK and its employees.

I declare under penalty of perjury under the laws to the State of Louisiana that the foregoing is true and correct.

Executed this 27th day of July, 1994 at Tokyo, Japan.

/s/ Teruo Fukushima
TERUO FUKUSHIMA

APPENDIX G

TDK (Japanese corporation)

↓

Drive Units

Shinko (Japanese corporation)

↓

Drive Units

UCAN (Japanese corporation)

Incorporated drive circuit into a finished humidifier which UCAN built.

↓

Humidifiers

Yamasho (Japanese corporation)

↓

Humidifiers

Beal (Maine corporation)

↓

Humidifiers

Warren/Sherer (Georgia corporation)

Incorporated UCAN humidifier into a refrigerated produce case. Warren/Sherer installed the produce case in the Winn-Dixie supermaret in Bogalusa, Louisiana.

↓

Humidifiers and Finished Display Cases

Winn-Dixie (Louisiana corporation)

FILED
JUL 17 1998
CLERK OF THE SUPREME COURT, U.S.

No. 97-2031

In The

Supreme Court of the United States

October Term, 1997

TDK CORPORATION,

Petitioner,

v.

WARREN/SHERER REFRIGERATION COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The First Circuit Court Of Appeal For The State Of Louisiana

OPPOSITION MEMORANDUM OF RESPONDENT WARREN/SHERER, A DIVISION OF KYSOR INDUSTRIAL CORPORATION, TO THE APPLICATION FOR WRIT OF CERTIORARI BY TDK CORPORATION

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the foreign manufacturer of an allegedly defective product which has caused severe personal injuries in the forum state, should be allowed to use due process as a shield to protect itself from potential liability, when the product in question was being used in a manner intended by the manufacturer and the product arrived in the forum state through a normal process of distribution from which the manufacturer's commercial enterprise profited?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TDK Corporation, Petitioner

RULE 29.6 STATEMENT:

All of TDK Corporation's subsidiaries in the United States are wholly-owned, and there is no other parent corporation.

Warren/Sherer Refrigeration Company, a Division of Kysor Industrial Corporation, Respondent

Sanyo Electric Company, Ltd., Respondent

Ms. Barbara Vince, Respondent
Mr. Donald Harris, Respondent
Ms. Sandra Creel Eisler, Respondent
Mrs. Camille McNeese, Respondent
Mr. Alfred Lambert, Respondent
Ms. Myrtis Statham, Respondent
Ms. Donna Warner, Respondent
Mrs. Luther Martin, Respondent
Ms. Barbara May, Respondent
Ms. Carolyn Magee, Respondent
Ms. Alene Smith, Respondent
Ms. Nora Byrd, Respondent
Mr. Charles Ray Weary, Respondent
Ms. Irene Carroll, Respondent

LIST OF PARTIES – Continued

Mr. M. J. Weary, Respondent
Mr. Michael Talmadge Walker, Respondent
Ms. Julia McGowan, Respondent
Ms. Evelyn Higgins, Respondent
Ms. Rebecca Phillips, Respondent
Mr. Herbert Toney, Respondent
Ms. Julie Richardson, Respondent
Ms. June Gatlin, Respondent
Mr. Robert Ladner, Respondent
Ms. Melissa Seal, Respondent
Mrs. Waver James, Respondent
Mrs. Mary Jenkins, Respondent
Mr. Robert Jenkins, Respondent
Mr. Sidney Gayle Bickham, Respondent
Ms. Gladys Neil Fields, Respondent

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law. . . . "

II. Louisiana Revised Statute Annotated Section 9:2800.51 *et seq.* (also known as the Louisiana Products Liability Act) states, in pertinent part:

9:2800.53

The following terms have the following meanings for the purpose of this Chapter:

(1) "Manufacturer" means a person or entity who is in the business of manufacturing a product for placement into trade or commerce. "Manufacturing a product" means producing, making, fabricating, constructing, designing, remanufacturing, reconditioning or refurbishing a product. "Manufacturer" also means:

* * *

(b) A seller of a product who exercises control over or influences a characteristic of the design, construction, or quality of the product that causes damage.

* * *

(3) "Product" means a corporeal movable that is manufactured for placement into trade or commerce, including a product that forms a component part of or that is subsequently

incorporated into another product or an immovable . . .

9:2800.54

A. The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity.

B. A product is unreasonably dangerous if and only if:

(1) The product is unreasonably dangerous in construction or composition as provided in R.S. 9:2800.55;

(2) The product is unreasonably dangerous in design as provided in R.S. 9:2800.56;

(3) The product is unreasonably dangerous because an adequate warning about the product has not been provided as provided in R.S. 9:2800.57; or

(4) The product is unreasonably dangerous because it does not conform to an express warranty of the manufacturer about the product as provided in R.S. 9:2800.58 . . .

III. Additionally, Louisiana Revised Statute Annotated Section 13:3201 provides, in pertinent part:

A. A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident:

* * *

(8) Manufacturing of a product or component thereof which caused damage or injury in this state, if at the time of placing the product into the stream of commerce, the manufacturer could have foreseen, realized, expected, or anticipated that the product may eventually be found in this state by reason of its nature and the manufacturer's marketing practices.

B. In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States.

STATEMENT OF THE CASE

This lengthy and complex litigation began with an outbreak of Legionnaires Disease in Bogalusa, Louisiana during October and November 1989. The disease, which results from exposure to *legionella pneumophilia* bacteria, caused illnesses in more than three dozen people and led to the death of several victims. The State of Louisiana Office of Public Health and the National Center for Disease Control investigated and traced the bacteria to a Bogalusa, Louisiana Winn-Dixie produce display case, which used a water-misting machine. The water-misting machine, more correctly identified as an ultrasonic humidifier, converted stored water into a fine mist, which was then sprayed into the air over the fruit and vegetables in the display case. Apparently, the *legionella* bacteria

infected the stored water and when the water was converted into a mist, the bacteria was inhaled, along with the water mist, by Winn-Dixie customers.

Several separate lawsuits were filed and most of these suits were eventually consolidated against the following defendants: Winn-Dixie; Yukyan Kabushiki Kaisha Co., Ltd. (hereinafter "Ucan"), a Japanese corporation who purchased a drive circuit for incorporation into its humidifier from another Japanese Corporation, TDK, the applicant herein; L. W. Beal, Inc. (hereinafter "Beal"), an American company that bought Ucan's humidifier; and Warren/Sherer Refrigeration Company, a division of Kysor Industrial Corporation (hereinafter "Warren/Sherer"), who purchased the humidifier from Beal for installation in its produce display case.

Winn-Dixie settled with plaintiffs before trial and was dismissed from the case. After trial began, but before a verdict was rendered, plaintiffs settled with Warren/Sherer, its insurer Wausau Insurance Company, and Commercial Union Insurance Company on behalf of L. W. Beal, who were the only viable defendants remaining in the case at that time.

The case was left open, however, and shortly thereafter, Warren/Sherer and Wausau filed third-party demands against TDK, the instant applicant, and Sanyo Electric Company, Ltd., another Japanese company (hereinafter "Sanyo"). The third-party demands included product liability claims and later, negligence claims against both third-party defendants. Subsequently, the original plaintiffs also filed a supplemental and amending petition alleging claims against TDK and Sanyo identical to those asserted by Warren/Sherer.

Warren/Sherer and plaintiffs allege TDK manufactured and sold the drive circuit that was incorporated in the ultrasonic humidifier, and that it was a defect in TDK's drive circuit that resulted in the infectious outbreak and plaintiffs' injuries. Thus, Warren/Sherer and plaintiffs allege that under the Louisiana Products Liability Act (La. Rev. Stat. Ann. 9:2800.51 *et seq.*) TDK is the "manufacturer" of the drive circuit as well as the humidifier, and is liable for all or part of the damages sustained by the original plaintiffs. Jointly and/or in the alternative to the products liability theory, Warren/Sherer and plaintiffs also allege TDK was negligent in its design and manufacture of the drive circuit.

EARLIER PROCEEDINGS

In response to Warren/Sherer's and plaintiffs' allegations, TDK filed declinatory exceptions of lack of personal jurisdiction. Trial Court Judge Hedges heard argument on May 2, 1997 and took the matter under advisement. On May 14, 1997, Judge Hedges overruled and dismissed TDK's exceptions. (TDK's App., 6a-7a). In her Reasons for Judgment, she found "Warren/Sherer carried its burden of proof with regard to TDK's minimum contacts with the forum state" and that TDK failed to show "it would be unduly burdensome to litigate in Louisiana in a suit brought by Louisiana plaintiffs regarding an incident which occurred in Louisiana." (TDK's App., 13a).

Seeking reversal, TDK applied for supervisory writ to the Louisiana First Circuit Court of Appeal. On December 29, 1997, a panel of the First Circuit composed of Judges Foil, Whipple and Kuhn denied the application in a *per curiam* written opinion (TDK's App, 1a-4a). The First Circuit also found Warren/Sherer had met its burden of proving TDK had minimum contacts in Louisiana. It also concluded that the trial court's assertion of jurisdiction satisfied "traditional notions of fair play and substantial justice." (TDK's App., 3a-4a).

In January 1998, TDK applied to the Louisiana Supreme Court for a writ of certiorari to review the First Circuit's decision. The Louisiana Supreme Court denied the writ, and the instant Petition for Writ of Certiorari to this Honorable Court was filed within 90 days of the state court writ denial. (TDK's App., 5a).

ARGUMENT – REASONS FOR DENYING TDK'S WRIT APPLICATION

THE CIRCUMSTANCES HEREIN DO NOT PRESENT A CASE OF FIRST IMPRESSION, NOR DO THE DECISIONS OF THE LOUISIANA COURTS CONFLICT WITH FEDERAL PRECEDENT OR TDK'S CONSTITUTIONAL RIGHTS.

The Louisiana Courts below correctly applied the settled and well-resolved legal precedent concerning the limits of due process and *in personam* jurisdiction. The issues involved in Louisiana's exercise of jurisdiction over TDK are not novel and upon the facts given, do not identify an unresolved aspect of *in personam* jurisdiction requiring this Court's attention. *See*, U.S. Sup. Ct. Rule 10,

28 U.S.C.A. West Supp. 1998. Each of TDK's alleged justifications for a writ of certiorari is based on nothing more than TDK's disagreement with the lower courts' view of the facts and application of the relevant case law to those facts. Although TDK cries foul at the idea of being held accountable in Louisiana, it fails to substantiate why due process is being violated in this case. Instead, the evidence shows TDK at the very least should have reasonably foreseen that a certain number of the drive circuits it manufactured and sold were entering foreign markets like Louisiana.

TDK'S ACTIONS MET THE "MINIMUM CONTACTS" TEST FOR JURISDICTION

In approaching the basic constitutional due process analysis necessary in all non-resident jurisdictional challenges, the Louisiana Supreme Court as well as the federal courts use the *International Shoe* two-step formula: (1) the non-resident must have certain minimum contacts with the forum state; and (2) the exercise of jurisdiction must not offend traditional notions of fair play and substantial justice. *International Shoe v. Washington*, 326 U.S. 310, 320, 66 S. Ct. 154, 160 (1945); *See also, deReyes v. Marine Management & Consulting*, 586 So.2d 103, 105 (La. 1991). In the context of products liability, this Court evaluated non-resident jurisdiction in the following terms:

> The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286, 297-98, 100 S. Ct. 559, 567 (1980).

Louisiana exercises personal jurisdiction over a non-resident to the full extent consistent with the non-resident's Fourteenth Amendment rights under the United States Constitution. Thus, Louisiana's long-arm statute provides for jurisdiction over a non-resident component part manufacturer. Further, the Louisiana Supreme Court has discussed, in detail, specific jurisdiction over a non-resident and in accordance with this Court's discussions of the same issue, stated:

> [T]he requirement of meaningful contacts is satisfied if the defendant has purposefully directed his activities at residents in the forum, and the litigation results from alleged injuries that arise out of or relate to those activities. By requiring that a defendant must have purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws, the requirement ensures that he will not be haled into a jurisdiction solely as a result of a random, fortuitous or attenuated contact, or by the unilateral activity of another party or a third person.

deReyes, 586 So.2d at 106 (citations omitted). Based on the multitude of cases since *International Shoe* and *World-Wide Volkswagen*, clearly, the focus in the stream-of-commerce analysis is not the number of contacts, but the nature of those contacts. *Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans*, 32 F.3d 953, 959 n. 15 (5th Cir. 1994).

The issue herein is whether it was reasonably foreseeable the TDK drive circuit would enter a forum such

as Louisiana at the time TDK manufactured and sold it into the stream-of-commerce in Japan. The answer to this question lies in the federal and state case law on non-resident jurisdiction which takes into consideration the economic realities of the modern world. "[T]he reasonable market participant in the modern commercial world has to expect to be haled into the courts of that state, however distant, to answer for any liability based at least in part on that exportation." *North American Philips v. American Vending Sales, Inc.*, 35 F.3d 1576, 1580 (Fed. Cir. 1994). In fact, according to *Petroleum Helicopters, Inc. v. Avco Corporation*, 804 F.2d 1367, 1370 (5th Cir. 1986), "[t]he stream-of-commerce principle is designed to encompass companies that purposefully serve markets broader than the states in which its initial or direct sales are made."

In *Barone v. Rich Brothers Interstate Display Fireworks*, 25 F.3d 610 (8th Cir. 1994), *cert. denied*, 513 U.S. 948, 115 S. Ct. 359 (1994), a products liability claim involving imported Japanese fireworks, the court stated:

> Although a generation has not quite passed since *World-Wide Volkswagen* was decided, the acceleration in the internationalization of commerce is apparent. In this age of NAFTA and GATT, one can expect further globalization of commerce, and it is only reasonable for companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in their home states.

Id., at 615. As recognized recently by a Louisiana Court, "[T]he interpretation of the particular nature of activities deemed to fall within the parameters of 'purposeful

availment' has evolved to reflect the modernization of interstate electronic communication and transportation." *Hunter v. Meyers*, 96-1075, p. 6 (La.App. 1 Cir. 3/27/97), 691 So.2d 318, 322.

Thus, the heart of the issue at bar is not whether TDK was actually cognizant the particular component part at issue would be incorporated into a grocery store produce case in Bogalusa, Louisiana. Instead, the issue is whether TDK should have anticipated the drive circuits would be incorporated into humidifiers used in locals such as Louisiana based on TDK's intention for the product's use, TDK's sales and its knowledge of the market. The Court must account for the broader, market-related issues involving TDK and its sale of drive circuits in general. In addition, the jurisprudence is abundantly clear that the focus should not be on what TDK subjectively intended or what it "thought" would happen. The standard is an objective rather than a subjective one. It centers on the entire factual context of the case, the actions of the manufacturer, and the reasonable effect of those actions. Thus, the fundamental question is whether, in serving the particular market TDK was serving by producing the product in question, TDK could or should have reasonably expected its product to end up in some place like Louisiana.

In applying those very same criteria to the instant matter, it seems clear TDK was or reasonably should have been aware that a certain number of the drive circuits it sold every year were making their way to the United States. By TDK's own admission, the drive circuits at issue were "designed for a wide range of applications." Warren/Sherer is unaware of any self-imposed limits or

restrictions TDK placed on its distribution of drive circuits. To the contrary, TDK obviously attempted to market the circuits on as wide an international basis as possible. If the sale and use of the drive circuits were truly random, fortuitous, or attenuated, as TDK has formerly alleged, it is highly unlikely TDK would have even been engaged in the circuit's production in the first place, since TDK's only logical purpose for doing so was to create a consistent profit.

Additionally, it is clear from the discovery already produced in this matter that TDK is truly an international corporation, with a world-wide reach both in corporate affiliations and in sales. Between 1985 and 1995, the percentage of TDK's total net sales occurring outside of Japan ranged from a low of 43.4% in 1988 to a high of 56.8% in 1995, with anywhere between one-third to one-half of that sub-total coming from the Americas. TDK currently has at least ten wholly-owned subsidiary corporations existing in the United States, with a cumulative total of thousands of employees.

Sales figures provided by TDK in response to Warren/Sherer's discovery requests indicate that literally thousands of the basic type of drive circuit at issue in this case are sold by TDK every year. This volume of sales is confirmed by the affidavit testimony of Teruo Fukushima, the General Manager of TDK's Legal Affairs Department, that was offered by TDK in connection with the disputed exceptions of jurisdiction and included in the instant Writ Application as part of TDK's Appendix pages 17a-20a.

In paragraph 5 of that affidavit, Mr. Fukushima also states that the drive circuit at issue has "a broad variety

of applications and uses in connection with humidifiers and misting machines." This statement clearly evidences TDK's own awareness of the particularized and yet still extensive distribution opportunities available for the drive circuit. TDK was certainly well-cognizant in manufacturing the drive circuit in question that it was producing a sophisticated, highly-technical, and highly-specialized electronic component, and that the market for such a product was also sophisticated, highly-technical, and highly-specialized. It was also very aware that the only intended function of the circuit was to serve as a component part of a larger item, which might then in turn be incorporated into something else.

TDK should not be permitted to avoid responsibility for the very serious physical and emotional harm done by an alleged defective product it made and sold (and derived revenue from) simply because a diffuse distribution system created several steps between the product's manufacture and its ultimate use. Accordingly, Warren/Sherer submits TDK could have reasonably anticipated its drive circuit would find its way into a larger product in the United States and then into Louisiana. TDK's actions clearly satisfy the minimum contacts test.

LOUISIANA'S EXERCISE OF JURISDICTION OVER TDK EASILY COMPORTS WITH CONSTITUTIONAL REQUIREMENTS OF FAIR-PLAY AND SUBSTANTIAL JUSTICE

Once sufficient minimum contacts are found to support Louisiana's exercise of personal jurisdiction, TDK can only escape jurisdiction by establishing the assertion of jurisdiction does not comport with the concept of fair

play and substantial justice. *International Shoe, supra.* Warren/Sherer respectfully submits TDK has failed to show Louisiana's exercise of jurisdiction is unfair. Specifically, the following factors must be examined: (1) the burden on the defendant to defend the suit in the forum state; (2) the forum state's interest in the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the judicial system's interest in obtaining an efficient resolution of the controversies; and (5) the state's shared interest in fostering fundamental substantive social policies. *See, World-Wide Volkswagen,* 444 U.S. at 292, 100 S. Ct. at 564; *Viam Corporation v. Iowa Export-Import Trading Company,* 84 F.3d 424, 429 (Fed.Cir. 1996); *Agramonte Gadea v. Citibank N.A.,* 964 F.Supp. 590, 595 (D.Puerto Rico 1997).

In this case, each of these five factors weighs strongly in favor of asserting personal jurisdiction over TDK. While it would be somewhat of a burden on TDK to defend the suit here in Louisiana, that burden is significantly less for a large international corporation like TDK, with a substantial presence in a number of states within the U.S., than it would be for average private citizens like the dozens of plaintiffs in this case. According to *Mohajer v. Monique Fashions,* 945 F.Supp. 23 (D.Puerto Rico 1996):

> It will almost always be burdensome for a defendant to defend itself in a foreign jurisdiction. In order for this factor to weigh against the court jurisdiction, therefore, it must be shown that the exercise of jurisdiction is onerous in a special, unusual, or other constitutionally significant way.

Id., at 28.[1] TDK certainly has not met that burden in this case.

The issue of judicial efficiency clearly cuts in favor of jurisdiction. Permitting the suit to continue in Louisiana, where a great deal of pleading and discovery has already taken place and where virtually all the relevant evidence is located, would definitely be more efficient than requiring the filing of what would be in essence an entirely new suit against TDK in Japan. While TDK cites *Asahi Metal Industrial Company v. Superior Court*, 480 U.S. 102, 105 S. Ct. 1026 (1987), as support for its attempts to dodge responsibility, one of the factors in *Asahi Metal* against a finding of jurisdiction was surely that those parties had alternative forums for their dispute that were more convenient to both of the parties. The only alternative in the instant matter is for all of the other parties to "pull up stakes" and move an ongoing judicial process to Japan.

But, undoubtedly the strongest of these "fair play" factors in favor of asserting jurisdiction against TDK is Louisiana's interests in the dispute. The lives of literally

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[1] See also *Cody v. Ward*, 954 F.Supp. 43, 47 n. 9 (D.Conn. 1997) ("The widespread use of facsimile equipment and overnight mail and the courts' increasing use of telephone conferences in lieu of live conferences reduces the burden on non-residents of litigating in a distant state. Even depositions can be done by telephone. . . . That leaves the burdens associated with the trial itself. But relatively few cases actually go to trial. Most are resolved before then. If a plaintiff's case has sufficient merit to survive a motion for summary judgment, requiring the defendant to bear the burden of traveling to the plaintiff's state for trial makes at least as much sense as requiring the plaintiff to do the traveling.").

scores of Louisiana citizens were adversely affected by the outbreak of Legionnaires' Disease at issue in this case. Without question, Louisiana has a paramount interest in protecting its citizens from defective products, especially those which cause harm on the scale present in this case.

"It is generally recognized that a forum state has a demonstrable interest in obtaining jurisdiction over a defendant who has caused a tortious injury within its borders." *Branch Metal Processing, Inc. v. Boston Edison Company*, 952 F.Supp. 893, 911 (D.R.I. 1996). In addition, it should be clear that promotion and encouragement of safe products, as well as holding those who sell defective products responsible for their actions, are certainly powerful "fundamental substantive social policies" in which Louisiana has a powerful and overriding interest.

Before concluding this argument, Warren/Sherer emphasizes the inappropriateness of re-examining Justice O'Connor's plurality in *Asahi Metal* in the context of the present facts.[2] The facts of *Asahi Metal* were significantly different in that it involved nothing more than an indemnity claim between a Taiwanese company and a Japanese company in a California court. While TDK attempts to characterize the instant matter as simply Warren/Sherer's

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[2] Likewise, an important distinction should be noted between the circumstances herein and some of the cases cited by TDK as instances where courts applied a minimum contacts "plus" test for personal jurisdiction. Several of the cases involve property damage where the courts have been reluctant to assert jurisdiction over a non-resident manufacturer. However, in situations of personal injury damage, like that suffered by the original plaintiffs herein, courts are more observant of the plaintiffs' limited options in seeking restitution elsewhere.

indemnification/contribution claim, it is primarily about who will bear ultimate responsibility to the injured citizens of Louisiana's Washington Parish for the outbreak of Legionnaires' Disease in Bogalusa. Despite TDK's repeated efforts to ignore plaintiffs and to misrepresent the nature of this case, the injured plaintiffs are still very much involved in this litigation and must not be forgotten.

Warren/Sherer acknowledges that this case might mandate a different outcome if the drive circuit at issue had arrived in Louisiana as a result of an unintended or unexpected use. However, to the contrary, the circuit was being used as an essential component part in an ultrasonic humidifier, the very use for which TDK designed it, intended it and marketed it. This case might also be different if the particular stream of commerce followed by the drive circuit had been in some way unusual or out of the ordinary. But, once again, the circuit found its way into Louisiana by a very normal and expected path of distribution.

On the basis of this factual context, Warren/Sherer submits that maintenance of personal jurisdiction against TDK in this matter would be in clear conformity with the due process analysis set down in *International Shoe*, and *World-Wide Volkswagen*. The presence in Louisiana of an allegedly defective TDK product through a stream of commerce which TDK knew was taking as much as 50% of its product to the Americas, and the harm that product is claimed to have caused, are sufficient minimum contacts with Louisiana on the part of TDK. As this Court stated in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462,

473-74, 105 S.Ct. 2174, 2183 (1985) (citations & quotations omitted),

> [W]here individuals purposefully derive benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity, it usually will not be unfair to subject him to the burden of litigating in another forum for disputes relating to such activity.

In addition, TDK's amenability to personal jurisdiction is in line with a balanced view of fair play and justice. Accordingly, TDK's declinatory exceptions of lack of personal jurisdiction to the third-party demand made against it by Warren/Sherer and to the supplemental and amending demand made against it by the plaintiffs were rightly overruled by Judge Hedges and her decision was correctly affirmed by the First Circuit.

CONCLUSION

As the Louisiana Supreme Court did, this Honorable Court should deny TDK's Application for Writ of Certiorari.

Respectfully submitted,

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